

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:ITA:B03

PLR-124366-08

Date: September 11, 2008

Legend

Taxpayer =

Parent P =

Sub X =

Sub Y =

Parent Q =

Sub A =

Sub B =

Sub C =

Corp N =

Date A =

Date B =

Date C =

Date D =

Year 1 =

S =

T =

Dear :

This letter is in response to your request for an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to increase the consent dividend election under § 565 (a) of the Internal Revenue Code for the taxable year ended Date C.

Facts

Prior to Date B, 100 percent of the common stock and at least 80 percent of the preferred stock of Sub C was owned by Sub B. Sub B was a wholly owned subsidiary of Sub A, and Sub A was a wholly owned subsidiary of Parent Q. Sub C elected to be treated as a Real Estate Investment Trust under § 856 for its initial tax year ending Date A and has at all times since its incorporation intended to be treated as a REIT. Sub C purchases residential and non residential fixed and variable rate mortgage loans for its portfolio. On Date B, Parent Q was merged with and into Parent P. Immediately thereafter, Sub A was merged with and into Sub X, a wholly owned subsidiary of Parent P, and all the assets of Sub B were transferred to Sub Y, a wholly owned subsidiary of Sub X, in a tax-free reorganization under § 368. On Date D Corp N acquired all the stock of Parent P and Sub C merged into Taxpayer.

Sub C timely filed Form 1120-REIT for the Year 1, and included in its return Form 972, Consent of Shareholder to Include Specific Amount in Gross income, in which it was agreed that Sub Y would include S in its taxable income for the tax year. Sub C also included in its return the related Form 973, Corporation Claim for Deduction for Consent Dividends.

Sub C subsequently discovered that it understated real estate investment trust taxable income on its Year 1 federal income tax return in the amount of U because the ledger information Sub C used to prepare its return only captured net income for the period following Parent Q's merger with Parent P.

Ruling Requested

Taxpayer, as successor to Sub C, is seeking to increase the amount of the consent dividend for Year 1 in the amount of T.

Law and Analysis

Section 565(a) provides that if any person owns consent stock (as defined in § 565(f)(1)) in a corporation on the last day of the taxable year of such corporation and such person agrees, in a consent filed with the return of such corporation in accordance with the regulations, to treat as a dividend the amount specified in such consent, the amount so specified shall, except as provided in §565(b) constitute a consent dividend for purposes of § 561 (relating to the deduction for dividends paid).

Section 1.565-1(a) of the Income Tax Regulations provides that the dividends paid deduction, as defined in § 561, includes the consent dividend for the taxable year. A consent dividend is a hypothetical distribution made by certain corporations to any person who owns consent stock on the last day of the taxable year of such corporation and who agrees to treat the hypothetical distribution as an actual dividend, subject to specified limitations, by filing a consent at the time and in the manner specified in §1.565-1(b). Section 1.565-1(b)(3) provides that a consent may be filed not later than the due date of the corporation's income tax return for the taxable year for which the dividends paid deduction is claimed. Under Rev. Rul. 78-296, 1978-2 C.B. 183, the due date for purposes of § 1.565-1(b)(3) includes the extended due date of a return filed pursuant to an extension of the time to file.

Section 301.9100-3(a) of the Procedure and Administration regulations generally provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) states that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer^B

- (i) requests relief before the failure to make the regulatory election is discovered by the Service;
- (ii) inadvertently failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the Service; or
- (v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make, the election.

Under ' 301.9100-3(b)(3), a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer--

(i) seeks to alter a return position for which an accuracy-related penalty could be imposed under ' 6662 at the time the taxpayer requests relief and the new position requires a regulatory election for which relief is requested; (ii) was fully informed of the required election and related tax consequences, but chose not to file the election; or (iii) uses hindsight in requesting relief. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Section 301.9100-3(c) of the regulations provides in part that the interests of the government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate, for all taxable years affected by the election, than the taxpayer would have had if the election had been timely made (taking into account the time value of money). Similarly, if the tax consequences of more than one taxpayer are affected by the election, the Government's interests are prejudiced if extending the time for making the election may result in the affected Taxpayers, in the aggregate, having a lower tax liability than if the election had been timely made. This section also provides that the interests of the government are prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessments under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

In the present case, Taxpayer, as successor to Sub C, has demonstrated that it acted reasonably and in good faith in that relief was requested before the failure to make the election was discovered by the Service.

Taxpayer has represented that none of the circumstances described in § 301.9100-3(b)(3) are present in this case, so that Taxpayer is not deemed to have not acted reasonably and good faith in this case.

Finally, in the present case, granting the relief will not prejudice the interests of the government, as described in § 301.9100-3(c). Granting relief will result in the same aggregate tax liability with respect to all affected taxpayers as would have resulted if the election had been timely made (taking into account the time value of money). None of the taxable years in which the election should have been made or that would have been affected by the election had it been timely made are closed by the period of limitations on assessments under § 6501(a).

Accordingly, the consent of the Commissioner is hereby granted for an extension of the time to file the forms necessary to make the § 565 consent dividend election for the taxable year 1. This extension shall be for a period of 45 days from the date of this

ruling. Please attach a copy of this ruling to the returns, schedules, and forms filed in connection with making this election under § 565 when such forms are filled.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Christopher F. Kane
Branch Chief, Branch 3
(Income Tax and Accounting)